

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

In re: THE RHODES COMPANIES,) E-Filed: 10/21/11
LLC,)
Debtor.) Case No.
BK-S-09-14814-LBR
Chapter 11

TRANSCRIPT OF PROCEEDINGS
OF
HEARING RE: MOTIONS
VOLUME 1
BEFORE THE HONORABLE LINDA B. RIEGLE
UNITED STATES BANKRUPTCY JUDGE

Wednesday, October 5, 2011

9:30 a.m.

Court Recorder: Deborah Hemstreet

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 APPEARANCES:

2 For The Litigation MICHAEL J. YODER, ESQ.
Trust of the Rhodes Diamond McCarthy, LLP
3 Companies, LLC: Two Houston Center
909 Fannin Street
4 Fifteenth Floor
Houston, Texas 77010

5 For James M. Rhodes: KEVIN N. ANDERSON, ESQ.
6 Fabian & Clendenin
215 South State Street
7 Suite 1200
Salt Lake City, Utah 84111

8 For Mutual of Omaha CHET A. GLOVER, ESQ.
9 Bank: Smith, Larsen & Wixom
1935 Village Center Circle
10 Las Vegas, Nevada 89134

11 For Chicago Title THOMAS A. RYAN, ESQ.
Company, Fidelity Fidelity National Law Group
12 National Title 3980 Howard Hughes Parkway
Insurance Company, Suite 230
13 and Security Title: Las Vegas, Nevada 89169

1 (Court convened at 09:33:57 a.m.)

2 THE CLERK: Bankruptcy court is now in session.

3 (Colloquy not on the record.)

4 THE COURT: Be seated.

5 (Colloquy not on the record.)

6 THE COURT: All right. Rhodes Companies.

7 Appearances, please.

8 MR. YODER: Michael Yoder on behalf of the
9 Litigation Trust of the Rhodes Companies, LLC, et al.

10 MR. ANDERSON: Kevin Anderson on behalf of
11 Jim Rhodes.

12 MR. GLOVER: Chet Glover on behalf of
13 Mutual of Omaha Bank.

14 MR. RYAN: Good morning, your Honor. Thomas Ryan
15 appearing on behalf of Chicago Title, Fidelity National Title,
16 and Security Title.

17 THE COURT: Okay. All right. So let's go ahead.

18 MR. ANDERSON: Your Honor, this is Mr. Rhodes' motion
19 to quash.

20 THE COURT: Now, at the last hearing, I specifically
21 asked you if you had complied with the local and federal rules
22 which require a meet-and-confer before the motion's filed, and
23 you told me you had done that.

24 MR. ANDERSON: Mr. Hague was here that day. I was
25 not present. But that said, I did make calls to Mr. Roberts

1 before we filed the motion.

2 THE COURT: Where is that in any of the pleadings?

3 MR. ANDERSON: I don't know that we filed a
4 declaration that that was done. In response to the Court's
5 request and instruction after the last hearing, I did have a
6 fairly lengthy conversation with Mr. Yoder on behalf of the
7 Litigation Trust, you know, in an effort to try to resolve the
8 issues.

9 THE COURT: So what was the context of your
10 conversation before the motion was filed?

11 MR. ANDERSON: It was a very brief conversation that
12 we objected and were going to file the motion to quash.

13 THE COURT: And I resent being lied to. Your counsel
14 last time implied to me that you had met the requirements of
15 the local rule which requires -- and the federal rule.

16 Rule 7037 says, "Discovery motions will not be considered
17 unless a statement of moving counsel is attached certifying
18 that after consultation or effort to do so the parties have
19 been unable to resolve the matter without Court action."

20 MR. ANDERSON: Well --

21 THE COURT: And that implies -- and then the federal
22 rule requires a good-faith attempt. None of this we're filing
23 the motion or else. Where is your good-faith effort to consult
24 before you filed the motion?

25 MR. ANDERSON: Well, Mr. Roberts' response was that

1 they weren't going to modify or change any of their subpoenas,
2 you know. I mean, they were going forward no matter what. We
3 had no alternative but to file the motion to quash.

4 THE COURT: But where's the certificate about your
5 consultation?

6 MR. ANDERSON: That we failed to include, your Honor.
7 I apologize.

8 THE COURT: Well, I really feel like I have been
9 misled because counsel seemed to indicate there was a sincere
10 effort to try and resolve this before the motion was filed.

11 MR. ANDERSON: Well --

12 THE COURT: And he implied --

13 MR. ANDERSON: -- I felt --

14 THE COURT: -- to me that --

15 MR. ANDERSON: -- like --

16 THE COURT: -- why I couldn't find that in their
17 motion, and I was just crazy.

18 MR. ANDERSON: And I feel like there was a sincere
19 effort, but I think both parties are fairly entrenched which is
20 evidenced by the fact that even in response and following the
21 hearing last -- was it last week -- you know, still the parties
22 are, you know, somewhat entrenched.

23 The Litigation Trust is apparently making accommodations
24 with some of the parties. But the scope and extent of those
25 accommodations, you know, we're not entirely aware of.

1 The only party that I know that they have made no effort
2 to make any accomodation with is the Fabian & Clendenin law
3 firm which has filed a motion to quash and an objection up in
4 Utah.

5 We did receive the letters from them that they've
6 indicated to the Court that they sent advising parties not to
7 respond until first after the hearing last week and then after
8 this hearing.

9 THE COURT: All right.

10 So, Mr. Yoder, do you know what attempts were made to
11 attempt to confer before the motion was filed?

12 MR. YODER: Unfortunately, your Honor, Mr. Roberts
13 who had handled the initial call is not here today. He just is
14 celebrating the birth of his first child over the weekend.

15 THE COURT: Okay.

16 MR. YODER: It is my understanding based on
17 conversations with him that the initial call was made regarding
18 whether or not we would consent to the order on the motion to
19 shortening time, not on the actual substance of the subpoenas
20 themselves for the initial one.

21 For the second attempt to meet and confer which occurred
22 last Friday, Mr. Anderson did call me. We did have a lengthy
23 conversation. We went back and forth.

24 We couldn't come to agreement on narrowing the subpoena in
25 terms of time or in terms of a limited number of just specific

1 transactions.

2 I offered to limit the subpoena if there were any
3 specific requests in each of the subpoenas that he had any
4 issue with.

5 We had provided a copy of each subpoena to Mr. Anderson,
6 and I didn't hear back from him on that proposal, and that the
7 reply was filed about an hour later.

8 THE COURT: Well, I feel like I've been lied to. And
9 before Mr. Anderson (sic) appears again, he'd better be ready
10 to explain his answers to me --

11 MR. ANDERSON: Okay.

12 THE COURT: -- and what attempts were really made.

13 MR. ANDERSON: Well, I --

14 THE COURT: Not Mr. Anderson. I'm sorry.

15 You're Mr. Anderson.

16 MR. ANDERSON: Mr. Hague.

17 THE COURT: Mr. Hague.

18 MR. ANDERSON: Yeah. Well, I apologize. There's
19 certainly no intent to mislead the Court.

20 THE COURT: I mean, he was very adamant about it, and
21 the way he responded was sort of like I'm crazy. It's
22 obviously here. It's not.

23 MR. ANDERSON: Well, and, again, you know, I think he
24 sincerely thought that it was there, but it --

25 THE COURT: I doubt it.

1 MR. ANDERSON: It was an oversight.

2 THE COURT: I don't think he knew what I was talking
3 about and pretended he did.

4 MR. ANDERSON: Well, I don't know. I apologize
5 again, your Honor. Would you like me to address --

6 THE COURT: Go ahead.

7 MR. ANDERSON: -- the status of where we're at now?

8 THE COURT: All right.

9 MR. ANDERSON: Following my conversation with
10 Mr. Yoder, there are two things that are apparent to me. The
11 first I think goes to, you know, the entire motion to quash.

12 It is very clear to me that the Litigation Trust has
13 specific litigation in mind. In fact, Mr. Yoder told me they
14 have a complaint filed and -- I mean, not filed -- prepared and
15 ready to file articulating issues with specific transactions
16 and specific events that they're ready to go on.

17 That said, they wanted to do these broad, extremely
18 overinclusive subpoenas to try to get additional information to
19 perhaps search for additional causes of action or as he put it
20 to refine the scope of some of their transactions that they
21 have questions about.

22 That is an improper use of a Rule 2004 examination. To
23 use it to support a litigation effort is an improper use of
24 Rule 2004.

25 What they should do is file their complaint, and then

1 let's go through the normal discovery process. The
2 J&R Trucking case as in others say that Rule 2004 is not a tool
3 for discovery.

4 Their response to our motion is replete with we're trying
5 to do discovery. We're trying to seek discovery here. We're
6 trying to seek discovery of that.

7 That said and if the Court is willing to allow them to
8 proceed with the 2004 examinations, Mr. Yoder has all but
9 conceded to me on the phone -- and he has certainly conceded to
10 several of the parties with whom they claim to have negotiated
11 a reduction of the scope of the subpoenas -- that they have
12 conceded that the subpoenas are overlybroad.

13 These things are way out of line. They point to,
14 for example, a couple of checks written to
15 Fabian & Clendenin.

16 Rather than asking about those specific events, they ask
17 for everything going back to January 2005, not only for any
18 debtor entities that Fabian & Clendenin may have represented,
19 but, also, all of the other nondebtor entities as well as
20 individuals who aren't even part of the bankruptcy like
21 Mr. Huygens.

22 Again, that's quite excessive. They want personal diaries
23 of the attorneys. They want --

24 THE COURT: Well, didn't you tell me there's a
25 separate motion to quash for them someplace else?

1 MR. ANDERSON: On the Fabian one, there is, but --

2 THE COURT: Okay.

3 MR. ANDERSON: But --

4 THE COURT: So I don't want to hear about that.

5 MR. ANDERSON: Well, that is replete. Every one of
6 the law-firm subpoenas are identical except for the name of the
7 law firm.

8 Every one of the title-company subpoenas are identical
9 except for the names of the title companies. Every one of the
10 financial-institution subpoenas are identical except for the
11 names.

12 THE COURT: Well --

13 MR. ANDERSON: There is no effort --

14 THE COURT: -- how does Mr. Rhodes have standing to
15 object to a subpoena asking about transactions with
16 Mrs. Rhodes?

17 MR. ANDERSON: One, he's a subject of a lot of these
18 subpoenas. They are seeking his personal information. And to
19 the extent that Rule 45 allows a party to object, he is a party
20 to the bankruptcy proceedings.

21 The Litigation Trust is well-aware of him. We're
22 well-aware of the Litigation Trust. We are a creditor in this
23 bankruptcy proceeding.

24 We have a pending proof-of-claim issue that we'll be
25 taking further evidence on in December before the Court. Those

1 issues haven't even been resolved.

2 If Mr. Rhodes is not a party, then there is no party. If
3 somebody who is actively involved in disputes with --

4 THE COURT: But --

5 MR. ANDERSON: -- the bankruptcy --

6 THE COURT: But they're asking --

7 MR. ANDERSON: -- estate --

8 THE COURT: -- for documents involving her, so how
9 does he have objection, a right to object?

10 MR. ANDERSON: Well, they're asking for documents
11 relating to him.

12 THE COURT: I understand, but you just told me that
13 it's overbroad because they're asking about documents for other
14 people.

15 MR. ANDERSON: Other people and for him. I mean,
16 it --

17 THE COURT: I understand.

18 MR. ANDERSON: Okay.

19 THE COURT: You just told me your objection was
20 because they were asking for documents, for example, for his
21 daughter. How does he have standing to object to documents
22 requested concerning his daughter?

23 MR. ANDERSON: I don't know that he does.

24 THE COURT: Okay. Then why did you tell me that?

25 MR. ANDERSON: Well, he has standing because he --

1 THE COURT: To object vis-a-vis him.

2 MR. ANDERSON: Vis-a-vis him --

3 THE COURT: Okay.

4 MR. ANDERSON: -- And vis-a-vis the entities, the
5 nondebtor entities, that he controls.

6 THE COURT: Okay. So he doesn't control -- how do we
7 know what entities he even controls?

8 MR. ANDERSON: Well, the --

9 THE COURT: He's kind of kept all that quiet.

10 MR. ANDERSON: Well, the reorganized debtors and the
11 Litigation Trust are well-aware of it. They've listed them
12 all.

13 Anyway, I think it's fairly clear that these subpoenas
14 are designed to assist in the litigation as an improper
15 purpose.

16 And I think that the Litigation Trust has acknowledged in
17 numerous conversations with at least several of the recipients
18 of these that they are extremely overbroad. And at a minimum,
19 this Court needs to have them reign these in.

20 I asked Mr. Yoder on the telephone call. Supposedly,
21 they have specific transactions that they are concerned
22 about.

23 Mr. Roberts' declaration does not identify them. He just
24 has conclusions about things that appear to be or that may have
25 happened.

1 THE COURT: But, now, you haven't even bothered to
2 set forth how they could be limited, right? You've just said
3 it's all overbroad. I'm not going to -- they shouldn't respond
4 to anything.

5 MR. ANDERSON: If --

6 THE COURT: The whole thing --

7 MR. ANDERSON: If --

8 THE COURT: -- should be quashed.

9 MR. ANDERSON: That's our position, yes.

10 THE COURT: Okay. You haven't even bothered to say
11 how they're narrowed. You're saying just because some might be
12 overbroad the whole thing should be quashed.

13 MR. ANDERSON: Well, that's all we're required to do,
14 then the burden shifts to them to show good cause as to why
15 they should be allowed to ask for anything.

16 THE COURT: Okay.

17 MR. ANDERSON: And Mr. Roberts' declaration doesn't
18 do that. He is very general. They supposedly have some
19 specific transactions.

20 They have not identified anything other than, you know,
21 two payments that were supposedly made to Fabian and Clendenin
22 which --

23 THE COURT: I told you I'm not going to consider the
24 Fabian one because it's under --

25 MR. ANDERSON: I --

1 THE COURT: You've got a motion to quash someplace
2 else.

3 MR. ANDERSON: I understand. That's the only
4 concrete example of two specific transactions. As to all the
5 others, you know, they don't tell us what events they are
6 looking into.

7 Some of those events could be subject to a release that
8 Mr. Rhodes is entitled to that he negotiated as part of the
9 reorganization plan. Some of them may not be.

10 But it's now their burden to explain to the Court, you
11 know, what they're after and why and for the Court to limit it
12 to those reasons at a minimum.

13 I think these things are so grossly overbroad they should
14 all be thrown out, and they should be required to go back to
15 the drawing board and have some very targeted discovery
16 requests if this Court's even going to allow them to conduct
17 litigation discovery as part of a 2004 examination.

18 THE COURT: Okay.

19 MR. ANDERSON: Thank you, your Honor.

20 THE COURT: All right. Response.

21 MR. YODER: Good morning, your Honor. I'll try to be
22 brief as I feel like our briefing handled a lot of these issues
23 fairly in a fair amount of detail.

24 First of all, I think the threshold issue here and
25 probably a big part of the reason between the contentions

1 between the two parties is just the fundamental
2 misunderstanding that Mr. Anderson has on the purpose of 2004.

3 As we point out in our brief, we cited some cases that
4 say, for example, quote, "Rule 2004 allows a trustee to do the
5 necessary investigatory work without the need for initiating
6 formal litigation which would just trigger the traditional
7 discovery tools.

8 Indeed, one purpose of such an examination is to give the
9 trustee the information needed to determine whether litigation
10 should be filed," and that's the in re J&R Trucking case cited
11 in our brief.

12 We also cited a case that says, "Even if litigation is,
13 quote, 'sure to be filed,' unquote, Rule 2004 discovery is
14 still appropriate because discovery presuit, quote, 'can be
15 critical to ensure that no viable cause of action is lost.'

16 For while it may be certain that suit will be filed
17 against a potential defendant, that does not mean all possible
18 claims, some of which might soon be lost to limitations, have
19 been identified," and that's the in re Mirant case cited on
20 page 6 of our brief.

21 And that's exactly what's going on here, your Honor. We
22 readily concede we are investigating claims against Mr. Rhodes
23 and the Rhodes entities pursuant to as contemplated by the
24 plan.

25 As Mr. Anderson indicated, we've identified a number of

1 transactions that, you know, if we had to file suit in the near
2 future we could.

3 There are additional transactions that we think are
4 suspicious on their face primarily involving transfers of
5 debtor assets to buy land for the Rhodes entities.

6 And what we don't want to do is file a suit that we have
7 indiciums of -- you know, every first indicia of fraud, and
8 then we end up having to go through pleading amendments and
9 narrow later on when we can file the most narrow suit possible
10 now.

11 And, yes, to the extent we identify additional claims in
12 doing that, we'll certainly pursue those claims to ensure that
13 they're not lost to limitations.

14 But the primary focus of our efforts really are to narrow
15 the number of transactions that we're looking at because, right
16 now, we're looking at potentially hundreds of transactions
17 involving tens if not hundreds of millions of dollars as it
18 relates to these lands transactions.

19 As to the burden of good cause, I think it's pretty
20 obvious to everyone in the courtroom that there will be
21 potential claims against Mr. Rhodes.

22 I think the fact that Mr. Rhodes has fought as vigorously
23 as he has in defending a proof of claim in which in his own
24 words he's repeatedly said the sole purpose of the proof of
25 claim is to obtain a \$10,000,000 setoff, it's pretty clear that

1 even Mr. Rhodes recognizes that there will be some claims.
2 There will be liability.

3 As we cited in our brief, you know, it is appropriate for
4 a Court to rely on representations of counsel as to the
5 existence of good cause when there are potential claims, and
6 that's the in re Metiom case cited on page 6 of our brief
7 again.

8 So, in short, as we point out in our brief, we have found
9 a bunch of claims, already, payments made to Jim Rhodes for his
10 personal income taxes, to fund his divorce settlement, to pay
11 legal fees and other professional fees rendered solely for
12 Mr. Rhodes to acquire real property, et cetera.

13 I think it's perfectly appropriate that the Trust would
14 investigate these claims to narrow the scope of any litigation
15 instituted against Mr. Rhodes.

16 As to any concerns the Court may have as the various other
17 entities, the individuals as they're defined in the subpoena,
18 the Rhodes entities as they're defined in the subpoena, the
19 debtors, obviously, they represent all the claims that all the
20 debtors hold, so there just happen to be a lot of debtors in
21 this case with the way the business was structured.

22 The Rhodes entities, again, to the extent that Mr. Rhodes
23 controls them, there's money flowing all around between the
24 different debtors and the Rhodes entities which is why a
25 substantive consolidation was granted in this case.

1 And a big part of the reason that we're looking at
2 transactions involving the different Rhodes entities and the
3 individuals is there are a lot of instances in which money had
4 been moved upstream from the debtors up to these Rhodes
5 entities and then from the Rhodes entities to Jim Rhodes or the
6 Rhodes entities for some other purpose.

7 And what we can see from the debtor records is money goes
8 from debtor to third party or debtor to a Rhodes entity for
9 what appears to be a purpose of the Rhodes entities or for
10 their benefit.

11 But we don't necessarily know what they did with it, and
12 that's what we're really trying to figure out. We don't want
13 to get into any indirect -- you know, step into any indirect
14 benefit-rule problems, et cetera.

15 As for the Fabian subpoena, obviously, that's not before
16 the Court today. That is the one -- we received the motion to
17 quash after we filed our response to the motion to quash filed
18 by Rhodes which is why we represented to the Court that as far
19 as we're concerned everything's been amicably resolved.

20 If Mr. Anderson is prepared today to represent to the
21 Court that he has no conflict of interest because Fabian
22 represented solely Rhodes, we'll gladly withdraw that subpoena
23 today.

24 To the extent that there is no representation of the
25 debtors, then I think we could be pretty confident that all the

1 funds from the debtors that went to Fabian did not confer any
2 benefit of the debtors for purposes of our litigation.

3 And I think that just to -- in conclusion, I think that
4 brings us to the final point is we really -- the whole purpose
5 of standing requirements or prohibitions of advisory opinions
6 in the first place in all litigation contexts is so that the
7 Courts aren't wasting their time issuing opinions on
8 hypothetical concerns, and that's essentially what Mr. Rhodes
9 is asking the Court to do here.

10 You know, we have amicably resolved or are in the
11 process of resolving our differences with all the other
12 entities.

13 To the extent, you know, who he -- Mr. Rhodes has no idea
14 more than we do how many different documents some of these
15 entities may or may not have.

16 It's ridiculous to quash a subpoena because an entity may,
17 in fact, have a lot of the records if no one knows. And at the
18 end of the day, that entity may have 200 pages, not 2,000,000,
19 and I think it's appropriate that we would just resolve those
20 subpoenas with the parties themselves.

21 Does the Court have any questions?

22 THE COURT: No.

23 Thank you.

24 MR. YODER: Thank you, your Honor.

25 THE COURT: Response.

1 MR. ANDERSON: I would encourage the Court to read
2 the J&R Trucking case because it is a case that says that a
3 Rule 2004 examination is not to be used in lieu of discovery.

4 Mr. Yoder's explanation again continues the vague
5 references to transactions. Apparently, they have some detail
6 about transactions that they need additional information about.

7 Rather than drafting subpoenas that go after the
8 information that they need, they have drafted, you know,
9 uniform sets of subpoenas that regardless of the role that the
10 people play or that they know or have suspicions about the role
11 that they played, they ask for information going back to 2004
12 or 2005.

13 If the Court is not going to quash the subpoenas, they
14 should be tailored to the specific transactions. Apparently,
15 they're doing that in these negotiations, although we have no
16 idea what they're doing.

17 We have yet to hear about one specific transaction
18 involving a title company that is subject to some legitimate
19 concern that they want specific documents regarding, the same
20 with bank transfers and the same with work that was performed
21 by law firms.

22 Thank you, your Honor.

23 THE COURT: Okay. Well, I'm going to deny the motion
24 to quash. 2004 is an appropriate method to examine the acts
25 and conduct of the debtor, and, obviously, it will lead to

1 litigation from time to time.

2 Is it the smartest way that the Trust should make
3 discovery? I don't know. That's not my business, but it is a
4 legitimate way.

5 And it's true while an action is pending that a 2004
6 should not be used it's not yet, and to suggest that a 2004
7 isn't appropriate where you're going to lead to litigation is
8 nonsense because that's the whole point.

9 You do a 2004 to see whether or not there are fraudulent
10 conveyances, to see whether or not there are transfers that
11 should be set aside, to see whether or not third parties have
12 assets of the debtor.

13 We already know that Mr. Rhodes kind of led a slipshod way
14 of doing business. We have in the proof-of-claim process. He
15 is claiming he should be reimbursed for paying a third party
16 because he wanted to keep it off the books.

17 All these kinds of transactions deserve investigation in
18 other contexts as well. We know he didn't care much about his
19 books and records from the way he did his business.

20 And, also, it's not the debtor's place to say this
21 subpoena is burdensome. The persons who are subpoenaed are
22 perfectly able to do that.

23 Secondly and finally, there was not a good-faith attempt
24 to try and resolve this. It's just Jim Rhodes saying no and
25 counsel taking no for an attitude, and I'm not going to

1 tolerate that kind of conduct.

2 Now, do we have -- has the Mutual of Omaha one been
3 resolved, yet, or do we need to argue that one?

4 MR. GLOVER: Your Honor, I believe the
5 Mutual of Omaha is all but resolved. We're trying to hammer
6 out just a few of the deadlines for production, and then at
7 such time we'll withdraw the objection.

8 THE COURT: All right. Okay. Thank you very much.
9 All right.

10 That's all.

11 Thank you.

12 THE CLERK: That's it?

13 Thank you, your Honor.

14 MR. ANDERSON: Thank you, your Honor.

15 MR. YODER: Thank you, your Honor.

16 THE CLERK: All rise.

17 (Court concluded at 09:57:46 a.m.)
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1 I certify that the foregoing is a correct transcript
2 from the electronic sound recording of the proceedings in
3 the above-entitled matter.

4
5
6 /s/ Lisa L. Cline

10/21/11

7 Lisa L. Cline, Transcriptionist

Date